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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

No. 659

FARGO GLASS & PAINT CO., a corporation,
Petitioner,

vs.

GLOBE AMERICAN CORPORATION, a corporation and THE MAYTAG COMPANY, a corporation,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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NO.

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GLOBE AMERICAN CORPORATION, a corporation and THE MAYTAG COMPANY, a corporation,

Respondents.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Fargo Glass & Paint Co., a corporation, respectfully prays that a writ of certiorari be issued to the

United States Court of Appeals for the Seventh Circuit to review its decision in an antitrust case reversing a judgment of the District Court in favor of petitioner in the sum of $148,976.48, with directions to dismiss the complaint. The District Court found respondents guilty of violating Sections 1 and 2 of the Sherman Act and Section 7 of the Clayton Act, which proximately caused damages of $39,560.36 to petitioner (R. 443, 444).

Opinion Below.

The opinion of the Court of Appeals is, as yet, unreported, but appears in the record at pages 486 to 496. The District Court's Findings of Fact and Conclusions of Law are reported in 101 F. Supp. 460, and appear in the record at pages 437 to 444.

Jurisdiction.

The jurisdiction of this Court is invoked under U.S.C. Title 28, Secs. 1254 (1) and 2101 (c).

The decision to be reviewed was rendered by the Court of Appeals for the Seventh Circuit on February 4, 1953 (R. 486).

QUESTIONS PRESENTED.

(1) Where a manufacturing corporation has an established system of national distribution for its product through contracts with a large number of distributors, and another distributor desires to obtain exclusive national distribution of the product for itself:

(a) Is it a violation of Section 7 of the Clayton Act for such distributor to purchase stock in the manufacturing corporation, not for investment but for the purpose of causing the cancellations of the contracts of all of the original distributors and obtaining exclusive distribution for itself?

(b) Is it a violation of Section 1 of the Sherman Act for such distributor to enter into a contract with certain stockholders of the manufacturing corporation whereunder it is agreed, by means of stock control, to cause the manufacturing corporation to cancel the contracts of all its original distributors and to confer by contract the exclusive national distribution upon such distributor?

(2) Does it fall short of a monopolization of "any part" of trade or commerce in violation of Section 2 of the Sherman Act unless the monopolization embraces all of a class of products in interstate commerce?

(3) After a distributor's contract has been procured to be cancelled by a competitor, who takes over exclusive distribution of the product in violation of the antitrust laws, is it a condition precedent to the existence of a cause of action under Section 4 of the Clayton Act that the cancelled distributor first make a demand upon its competitor to sell the product to it at factory price?

(4) When a violator of the antitrust laws takes over the business of its victim, are the violator's net profits from such business too speculative and uncertain to be a measure of the victim's damages where

(a) The relevant period was one of a seller's market and the victim was a competent distributor.

(b) The violator and the victim both operated on the same basis of expenses and net profits, and

(c) No other measure of damages is possible because the business destroyed was a new one with no history of past profits to afford a measure of damages, and because the violator also destroyed all other like businesses so that no comparison of profits with them is possible.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

Petitioner brought this action under Section 4 of the Clayton Act (U.S.C. Title 15, Sec. 15) to recover treble damages for violations of Sections 1 and 2 of the Sherman Antitrust Act (U.S.C. Title 15, Secs. 1 and 2) and of Section 7 of the Clayton Act (U.S.C. Title 15, Sec. 18).

After a trial by the Court without a jury, the District Court entered detailed Findings of Fact and Conclusions of Law (R. 437-444; 101 F. Supp. 460), finding that respondents had violated said sections of the antitrust laws, and entered a judgment for petitioners in the amount of $148,976.48 (R. 458).

The uncontroverted evidence showed, and the District Court found, that respondent, Globe American Corporation (hereinafter referred to as "Globe") had two manufacturing plants, one at Macomb, Illinois, which manufactured agricultural equipment and one at Kokomo, Indiana, that manufactured Dutch Ovens (R. 437). The Dutch Oven is the only gas range manufactured in the United States which combines the utilitarian features of automatic shut-off and heat retention (Finding 9, R. 438). During World War II Globe engaged in war work, but at the end of the war it made plans and took definite steps to reconvert the Kokomo plant for the post-war manufacture of Dutch Ovens. In pursuance of this program, Globe set up a system of national distribution for the Dutch Oven through contracts with 65 distributors, including petitioner, and 45 key dealers. The essence of the distributors' contracts was that each distributor agreed to purchase from Globe a designated quota of Dutch Ovens annually, and

placed an order with Globe for one-half of the quota. The distributors also agreed to secure dealers for Globe (R. 16-18). By September, 1945 the 65 distributors had secured over 3,000 dealers for Globe, and Globe had received orders for over 35,000 Dutch Ovens amounting to approximately $3,500,000.00 (R. 439). Petitioner was Globe's distributor for the territory of North Dakota, and certain counties of Minnesota and South Dakota, and had secured 154 distributors for Globe (R. 440).

Respondent, The Maytag Company, (hereinafter referred to as "Maytag"), was engaged in the business of manufacturing a washing machine, and also was a distributor for other lines of home appliances manufactured for it. At the time Globe set up its system of national distribution, Maytag was actively but unsuccessfully looking for a gas range manufacturer to manufacture gas ranges for it to distribute under the Maytag name (R. 83-85).

On September 19, 1945 Maytag entered into a written contract with certain of the principal officers and stockholders of Globe (R. 343-347). By this contract Maytag agreed to purchase approximately 40% of the stock of Globe from certain other stockholders of Globe. The contract provided that the parties who combined had stock control over Globe, would cause Globe to sell its entire output to Maytag, thus giving Maytag the exclusive national distribution of the Dutch Oven (R. 347).

Maytag did purchase 40% of the stock of Globe (R. 348-349). Four Maytag officials were elected to Globe's Board of Directors (R. 350). The said contract was carried out. The Board adopted a resolution to cancel the contracts of all the 65 distributors and 45 key dealers (R. 349). The Board then authorized the president on behalf of Globe to enter into a contract with Maytag (R. 353).

A contract between Maytag and Globe was entered into on the same day, whereunder Globe agreed to sell its entire output of Dutch Ovens to Maytag, and Maytag agreed to purchase "its entire requirements" of gas ranges from Globe (R. 21-26). Thereafter Globe did cancel the contracts of all its original distributors and key dealers, including petitioner (R. 27-28, 359-360), thereby excluding them from selling Dutch Ovens in interstate commerce.

Since September, 1945 Maytag has been acting as the exclusive distributor for Globe's Dutch Ovens (R. 442).

The President of Maytag admitted that Maytag's purchase of Globe stock was not made for purpose of investment, but that the purchase of the stock and the granting to it of exclusive distribution "was part of one package" (R. 105).

The answer of respondents set up the affirmative defense that Globe did not have the necessary funds to complete the reconversion program for its Kokomo plant, and that by its agreement appointing Maytag its exclusive distributor the "conversion of Globe's facilities was [made] financially feasible" (R. 36-37). The District Court found that "Globe had sufficient funds for post-war reconversion." (Finding 19, R. 439). The Court of Appeals did not disturb this finding.

The Court of Appeals reversed the judgment of the District Court with directions to dismiss the suit. The reversal involved the following:

(1). The District Court found that Maytag's purchase of Globe stock "was not made by Maytag for the purpose of acquiring an investment in Globe, but was made for the sole object of acquiring from Globe the exclusive distribution of Dutch Ovens and eliminating the competition of said 65 distributors and 45 key dealers in the business of distributing Dutch Ovens in interstate com-

merce" (Finding 36, R. 441), and held that such acquisition was in violation of Section 7 of the Clayton Act (R. 443-444). The Court of Appeals did not disturb the District Court's finding of fact. It held, however, that Section 7 was not violated, in spite of the fact that Maytag's acquisition of Globe stock was not made for investment but to obtain exclusive distribution of the Dutch Oven, and thus falls outside the exception set forth in the third paragraph of Section 7 of the Clayton Act, (U.S.C. Title 15, Sec. 18).

(2). The District Court found that all persons other than Maytag were excluded from distributing Dutch Ovens in interstate commerce (Finding 42, R. 442), and held that Maytag monopolized such commerce in violation of Section 2 of the Sherman Act (R. 443). The amount of commerce involved, at distributor level, was over $5,000,000.00 per year (Finding 48, R. 442). The Court of Appeals did not disturb the District Court's findings, but reversed the District Court on the ground that there was no proof Maytag intended to monopolize the trade of selling all makes of gas ranges (R. 495), only that of Dutch Ovens.

(3). The District Court found that Maytag's acquisition of exclusive distribution was effected through a combination, conspiracy and contract with certain stockholders of Globe (R. 440-442), and held that the means were illegal and in violation of section 1 of the Sherman Act (R. 443). The Court of Appeals reversed the District Court on the ground that Maytag had a legitimate purpose in securing the exclusive distribution contract from Globe, such purpose being that it did not desire to market Globe's gas range under the Maytag name when the identical gas range was being sold by the other distributors under the Dutch Oven name, and because Maytag did not believe Globe had the capacity to supply it with its requirements and at the same time supply other distributors with a different type of gas range (R. 489).

(4.) The Court of Appeals held that petitioner could not maintain its action against respondents since, *after* its written cancellation as a Dutch Oven distributor, it made no demand upon Maytag for Dutch Ovens to distribute (R. 495).

(5). The District Court held that Maytag's net profits from the sale of Dutch Ovens in petitioner's territory was a proper measure of petitioner's damages (R. 444). With respect to the use of this measure, the record shows the following:

(a) The parties stipulated on appeal that the period from 1945 to 1948, inclusive, was one of a seller's market in the gas range field (R. 481), *i.e.* that demand exceeded supply. During this period approximately 80% of the Dutch Ovens were sold (R. 53).

(b) The parties stipulated that petitioner was a competent distributor of home appliances (R. 440, 480).

(c) Respondents admitted that Maytag sold 3477 Dutch Ovens in petitioner's territory at an aggregate price of $500,633.80; that its expenses in making said sales was $59,930.72, which in round figures is 12% of sales; that its net profits from said sales was $39,-560.36, which in round figures is 8% of sales (R. 372, 374).

(d) The undisputed evidence was that petitioner's expenses in making sales of home appliances was also 12% of sales, and that its net profits was also 8% of sales (R. 147).

On the above record, the Court of Appeals held that Maytag's net profits as a measure of petitioner's damages was speculative, remote and uncertain,

citing the old case of *Central Coal & Coke Co.* v. *Hartman*, 111 Fed. 97, and paying no heed to this Court's rulings in *Eastman Co.* v. *Southern Photo Co.*, 273 U.S. 359; *Story Parchment Co.* v. *Paterson*, 282 U.S. 555; and *Bigelow* v. *RKO Radio Pictures*, 327 U.S. 251, which have rendered the decision in the *Central Coal* case largely obsolete.

Reasons For Granting The Writ.

The discretionary power of this Court to grant a writ of certiorari is invoked upon the following grounds:

1. Maytag's admission that it acquired Globe stock not for purpose of investment but to obtain exclusive distribution of the Dutch Oven, whereby the original Globe distributors were excluded from a commerce of more than $5,000,000.00 per year, placed such stock acquisition squarely within the prohibition of Section 7 of the Clayton Act. The failure of the Court of Appeals for the Seventh Circuit to give effect to the plain provisions of Section 7 requires the exercise of this Court's supervisory powers in order to preserve the vitality of the antitrust laws in which the public has direct concern. The decision of the Court of Appeals for the Seventh Circuit also is in conflict in principle with the decision of the Court of Appeals for the Third Circuit in *Pennsylvania R. Co.* v. *Interstate Commerce Commission*, 66 F. 2nd 37.

2. The holding of the Court of Appeals for the Seventh Circuit that Section 2 of the Sherman Act was not violated because there was no allegation or proof that Maytag intended to monopolize the trade of selling all makes of gas ranges, but only that of Dutch Ovens, places such a restricted interpretation upon the prohibition of Section 2 against monopolization of "any part" of trade or commerce, as in a large measure to render Section 2 nugatory. This holding of the Court of Appeals of the

Seventh Circuit is in conflict with the decisions of the Supreme Court in *Indiana Farmer's Guide Pub. Co.* v. *Prairie Farmer Pub. Co.*, 293 U.S. 268, and *United States* v. *Yellow Cab Co.*, 332 U. S. 218, and with the rule announced by the Court of Appeals for the Third Circuit in *William Goldman Theatres* v. *Loew's Inc.*, 150 F. 2nd 738.

3. The holding of the Court of Appeals for the Seventh Circuit that Maytag could contract with Globe for the purchase of the entire output of Globe, without any regard to the question of whether or not such contract was obtained by Maytag through a combination or conspiracy, violates a basic principle of antitrust law,—namely: that an act lawful when done by one may become wrongful when achieved through a concert of action. *Federal Trade Commission* v. *Raymond Co.*, 263 U. S. 564; *Bedford Co.* v. *Stone Cutters Assn.*, 274 U. S. 37; *Kiefer-Stewart Co.* v. *Seagram & Sons*, 340 U. S. 211. Abandonment of this basic principal will seriously affect the enforcement of the antitrust laws.

4. The holding of the Court of Appeals for the Seventh Circuit that a distributor whose contract with a manufacturer has been unlawfully cancelled, cannot maintain an action for damages under Section 4 of the Clayton Act, unless *after* its cancellation it makes a demand upon the competitor who wrongfully excluded it from the market to supply it with the monopolized product, is contrary to the rules that a demand is not a condition precedent to maintaining an action based on *tort* and is unnecessary when futile. The Court of Appeals for the Seventh Circuit is the only Court of Appeals which has laid down the requirement of a demand as a condition precedent to the existence of a cause of action having first done so in *Milwaukee Towne Corporation* v. *Loew's Inc.*, 190 F. 2d 561. As this is a recurring problem, it should definitely be settled by this Court.

5. (a). In holding on the authority of *Central Coal & Coke Co.* v. *Hartman,* 111 F. 97, that on the facts in this case, Maytag's net profits from the sale of Dutch Ovens in petitioner's territory as a measure of petitioner's damages, were speculative and uncertain, the Court of Appeals for the Seventh Circuit has revived a rule of damages made obsolete in *Eastman Co.* v. *Southern Photo Co.,* 273 U. S. 359; *Story Parchment Co.* v. *Paterson,* 282 U. S. 555; and *Bigelow* v. *RKO Radio Pictures,* 327 U. S. 251. The failure of the Court of Appeals to adhere to the rulings of this Court calls for the exercise of this Court's power of supervision.

(b). The holding of the Court of Appeals also is in conflict with the decision of the Court of Appeals for the Eighth Circuit in *Twentieth Century-Fox Film Corp.* v. *Brookside Theatre Corp.,* 194 F. 2d 846, where it was held that when a violator of the antitrust laws takes over the business of its victim, the violator's profits are a proper measure of the victim's damages.

6. The Court of Appeals has decided important questions of federal law in a manner which in effect deprives the public of the benefit of civil suits under the antitrust laws and tends to encourage a violation of those laws.

Wherefore, it is respectfully submitted that this petition for a writ of certiorari to the Court of Appeals for the Seventh Circuit should be granted.

Respectfully Submitted,
Fargo Glass & Paint Co.,
Petitioner

by Edward Atlas,
Harry G. Fins,
Bernard N. Buchloz,
Counsel for Petitioner.

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NO.

FARGO GLASS & PAINT CO., a corporation,
Petitioner,

vs.

GLOBE AMERICAN CORPORATION, a corporation and THE MAYTAG COMPANY, a corporation,
Respondents.

BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI.

Statement of the Case.

The essential facts of the case are stated in the accompanying petition for a writ of certiorari.

Jurisdiction.

The jurisdiction of this court is shown in the accompanying petition.

Opinion Below.

The opinion of the Court of Appeals is as yet, unreported. It appears at pages 486 to 496 of the record.

Errors to be Urged.

The Court of Appeals for the Seventh Circuit erred in reversing the judgment of the District Court in favor of petitioner:

(1) In holding that Maytag's purchase of Globe stock was not in violation of Section 7 of the Clayton Act.

(2) In holding that respondents did not violate Sections 1 and 2 of the Sherman Act.

(3) In holding that a demand is a condition precedent to the existence of petitioner's cause under Section 4 of the Clayton Act.

(4) In holding that Maytag's net profits from the sale of Dutch Ovens in petitioner's territory are not a proper measure of petitioner's damages.

(5) In failing to give effect to the District Court's findings of fact.

ARGUMENT.

I.

The Court of Appeals for the Seventh Circuit Did Not Give Effect To The Plain Provisions of Section 7 of the Clayton Act. Its Decision is in Conflict in Principle with a Decision of The Court of Appeals for the Third Circuit.

Maytag admitted that its purchase of Globe stock was not made for the purpose of investment, but was made solely to secure the exclusive distribution of the Dutch Oven, that the purchase of the stock and the acquisition

of the exclusive distribution "was part of one package" (R. 92, 105).

The District Court found:

> "36. The agreement by Maytag to purchase, and its purchase, of such Globe stock was not made by Maytag for the purpose of acquiring an investment in Globe, but was made for the sole object of acquiring from Globe the exclusive distribution of Dutch Ovens and of eliminating the competition of said 65 distributors and 45 key dealers in the business of distributing Dutch Ovens, in interstate commerce" (R. 441).
>
> "42. Since September 19, 1945 to the present time all of said 65 distributors, including Fargo, and said 45 key dealers, and all other persons, were excluded from the distribution of Dutch Ovens, and Maytag has been the exclusive distributor for said Dutch Ovens" (R. 442).

The Court of Appeals did not disturb these findings.* The District Court held that such acquisition was in violation of Section 7 of the Clayton Act (R. 443-444).

There was nothing in Globe's contracts with its 65 distributors which prevented Globe from making Maytag a national distributor of its automatic shut-off, heat-retained gas ranges, to be marketed under the Maytag name, in competition with each of the 65 distributors selling the oven under the Dutch Oven name (R. 16). But Maytag admitted it did not want to engage in such a competitive business (R. 89). As correctly stated by the Court of Appeals, "Maytag did not desire to market a range under its own name, which was identical with a product being sold under another name, and it did not believe that Globe had the capacity to supply its re-

* With respect to finding 42 the Court of Appeals stated that Maytag was not a distributor because it bought ovens from Globe and sold them on its own account (R. 493). This is a meaningless quibble about the parties' use of the word "distributor" because at the trial respondents' attorney conceded that the relationship between Globe and its 65 distributors under their contracts was likewise one of seller and buyers (R. 220).

quirements and at the same time manufacture gas ranges of a different type for their customers" (R. 489). As the District Court found, the object of Maytag in acquiring Globe stock, and the effect of such acquisition, was to exclude the 65 distributors from competing with Maytag, and thus gave Maytag a monopoly in the business of distributing automatic shutoff, heat-retained gas ranges.

Section 7 of the Clayton Act (U.S.C. Title 15, Sec. 18), prior to its recent amendment, made it unlawful for any corporation engaged in commerce to acquire any part of the stock of another corporation engaged also in commerce "where the effect of such acquisition may be * * * to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce".

The third paragraph of Section 7 provides in part, "This section shall not apply to corporations purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition."

Maytag's purchase of Globe stock did not fall within this exception, as Maytag admitted that it did not purchase the Globe stock for investment but to acquire exclusive distribution of the Dutch Oven, as a result of which 65 distributors and 45 key dealers were eliminated from the commerce of selling Dutch Ovens. As this commerce averaged over $5,000,000.00 a year (R. 442), Maytag's purchase of Globe stock brought about a substantial lessening of competition. In *United States* v. *International Salt Co.*, 6 F.R.D. 302 (Dist. Ct., S.D. N.Y., 1946), affirmed in 332 U. S. 392, the court held that a restraint on a "business aggregating $500,000 per annum is, without more, undue and unreasonable, and the lessening of competition on its face, substantial" (p. 307). The Supreme Court held that such volume of business "cannot be said to be insignificant or insubstantial" (332 U. S. at p. 396).

Maytag's purchase of Globe stock therefore falls plainly within the prohibition of Section 7 of the Clayton Act, and falls clearly outside the exception made in the third paragraph of Section 7, in the case of purchases of stock made for investment. The District Court was thus entirely correct in holding that Maytag violated Section 7 (R. 443-444).

The Court of Appeals reversed the District Court on the ground that Maytag was justified in purchasing the Globe stock and excluding the 65 distributors because Maytag did not believe that Globe had the capacity to supply its requirements and at the same time manufacture a gas range of a different type for the other distributors (R. 489).* This basis for reversal is insupportable because the fact that a commodity is in short supply does not justify a monopolization, but to the contrary aggravates the wrong.

By holding that an intent to monopolize a product in short supply is legal justification for what would otherwise patently be a violation of Section 7, the Court of Appeals has failed to give effect to the plain language of the section. The substantial public interest in maintaining the vitality of the antitrust laws calls for the exercise of this Court's supervisory powers to see that such laws are given effect.

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* The Court of Appeals stated that as a matter of fact Globe was never able to supply Maytag with the number of ranges ordered except during the first six months of 1949. This is flatly contrary to the figures in the record furnished by respondents showing Globe's production and Maytag's purchases. The president of Maytag testified that the Kokomo plant was set up to turn out 100,000 gas ranges per year (R. 270) and he likewise stated the same figure in a letter to Globe's sales manager, (R. 395). In the fiscal year ending November 30, 1948 Globe produced over 72,000 Dutch Ovens (R. 52). Maytag's purchases for the period from October 1946 to January 28, 1951 actually averaged only about 50,000 ovens per year (R. 442).

Further, the disregard by the Court of Appeals of the Seventh Circuit of Section 7 of the Clayton Act in the instant case is in conflict with the interpretation of such section by the Court of Appeals for the Third Circuit in *Pennsylvania R. Co.* v. *Interstate Commerce Commission*, 66 F. 2d 37, 40.

II.

The Decision of the Court of Appeals For the Seventh Circuit That There is No Violation of Section 2 of the Clayton Act Unless All of a Certain Class of Products are Monopolized, is in Conflict with Decisions of this Court and of the Court of Appeals for the Third Circuit.

The complaint charged the respondents with combining and conspiring to monopolize for the benefit of Maytag the commerce of distributing the Dutch Ovens manufactured by Globe, (R. 11-12). There is no dispute in this record that since September, 1945 Maytag has been the exclusive distributor for the Dutch Oven, and has monopolized such distribution. The District Court so found, and held that such monopolization was in violation of Section 2 of the Sherman Act (R. 442-443).

The Court of Appeals reversed the District Court on the ground that the complaint did not allege, nor was there proof, that Maytag monopolized the trade of selling all makes of gas ranges (R. 495), but only that of Dutch Ovens.

Section 2 of the Sherman Act (U.S.C., Title 15, Sec. 2) makes it unlawful to monopolize "any part of the trade or commerce among the several States * * *". Thus the Court of Appeals has interpreted "any part" of trade or commerce to mean all commodities falling within a certain class, such as for example, all makes of refrigerators, or all makes of bicycles, or all makes of taxicabs.

The interpretation of the Court of Appeals is in conflict with the Supreme Court's intepretation of Section 2 in *Indiana Farmer's Guide Pub. Co.* v. *Prairie Farmer Pub. Co.*, 293 U. S. 268, 279 where it held that Section 2 of the Sherman Act applies to "any part of the classes of things forming a part of interstate commerce". This interpretation has been adhered to in *Lorain Journal* v. *United States*, 342 U.S. 143, 151 and *United States* v. *Yellow Cab Co.*, 332 U.S. 218, 226. In the *Yellow Cab* case the defendants urged that the complaint was defective because it did not charge a monopoly with reference to all the taxi cabs manufactured and sold in the United States. This Court, however, held that it was sufficient for a violation of the Sherman Act, if there was a monopolization of "an appreciable segment" of commerce without regard to what percentage it was of the whole. In the instant case the segment of commerce involved amounted to over $5,000,000.00 per year, which is appreciable under any view.

The holding of the Court of Appeals for the Seventh Circuit is likewise in direct conflict with the decision of the Court of Appeals for the Third Circuit in *William Goldman Theatres* v. *Loew's Inc.*, 150 F. 2d 738 where it was held that the prohibition against monopolization of "any part" of commerce includes the situation where the monopoly embraces "only a part of an industry involved" (p. 744).

The departure of the Court of Appeals from the interpretation placed by this Court on Section 2 of the Sherman Act, and the conflict of its decision with the decision of the Court of Appeals for the Third Circuit call for correction by this Court.

III.

The Court of Appeals for the Seventh Circuit Disregarded the Basic Principle That An Act Lawful When Done by One May Become Wrongful When Achieved Through a Concert of Action.

The Court of Appeals held that it was lawful for Maytag to cause Globe to cancel the contracts of Globe's original 65 distributors and 45 key dealers and to take over the exclusive national distribution of the Dutch Oven for itself on the ground that a contract by one party to sell his entire output to, or to take his entire requirements of a commodity, from the other is not contrary to the antimonopoly statutes, quoting from 83 A.L.R. 1173 which is an annotation to a case involving Arkansas law (R. 494).

Apart from the fact that an entire requirements provision may violate Section 3 of the Clayton Act, such proposition is true only where the selection of his customer is the free and independent act of the manufacturer. It does not hold true when such selection results from a combination or conspiracy engaged in by the customer to exclude competitors from commerce, in which case it becomes unlawful. It is a basic principal of antitrust law that an act lawful when done by one may become wrongful when done through a concert of action or conspiracy. *Federal Trade Commission* v. *Raymond Co.*, 236 U. S. 564 573-574; *Bedford Co.* v. *Stone Cutters Assn.*, 274 U. S. 37, 54; *Kiefer-Stewart Co.* v. *Seagram & Sons*, 340 U. S. 211, 214. This basic proposition is a necessary corollary to the fact that Section 1 of the Sherman Act outlaws "Every contract, combination, * * * or conspiracy, in restraint of trade or commerce * * *." The Courts have frequently applied this overriding principal in antitrust cases where the right to select one's own customers was asserted as a defense. *Federal Trade Commission* v.

Beech-Nut Co., 257 U.S. 441, 453; *Lorain Journal* v. *United States*, 342 U. S. 143, 155; *Western Sugar Refinery Co.* v. *Federal Trade Commission*, 275 Fed. 725, 747 (C. A. 9, 1921); *Johnson* v. *J. H. Yost Lumber Co.*, 117 F. 2d 53, 61 (C. A. 8, 1941); *William Goldman Theatres* v. *Loew's, Inc.*, 150 F. 2d 738, 742-743 (C.A. 3, 1945).

In the instant case, the exclusion of Globe's original distributor organization from the commerce of selling Dutch Ovens did not result from Globe's dissatisfaction with such organization. This organization had given Globe orders for over 35,000 Dutch Ovens (R. 439) amounting to approximately $3,500,000.00. Globe was satisfied with this organization and termed it "the finest merchandising organization in the United States" (R. 27). Nor did the elimination of Globe's original distributor organization result from the free and independent choice of Globe to supplant it with Maytag. The elimination was the direct result of the written contract entered into between Maytag and certain stockholders of Globe whereunder, in consideration of Maytag's purchase from other stockholders of approximately 40% of the stock of Globe, the parties agreed to combine their voting power so as "to cause said Globe American Corporation and the Party of the Second Part (Maytag) to enter into a working agreement, to be effective for a reasonable time hereafter, which will assure to the Party of the Second Part, under certain conditions, the prior right and privilege of purchasing for resale the entire output of gas and electric ranges and related products to be manufactured at the plant of the Globe American Corporation at Kokomo, knows as the Kokomo Division * * *" (R. 347).

It was because Maytag acquired its contract for Globe's entire production by means of a combination and conspiracy, and not because an entire output contract is *per*

se unlawful, that the District Court held that Section 1 of the Sherman Act was violated (R. 295). The Court of Appeals, in reversing the District Court on the ground that the antitrust laws do not prohibit a manufacturer from selling his entire output to one customer, did not even render lip service to said great overriding principle of antitrust law, that a relationship otherwise lawful may become unlawful if achieved by means of a combination or conspiracy.

A sound regard for the preservation of the vitality of the antitrust laws calls upon this Court to review this case where the Court of Appeals failed to apply a basic principle.

IV.

The Court of Appeals for the Seventh Circuit Has Laid Down the Harmful Doctrine That a Victim of Antitrust Law Violations Has No Cause of Action Against The Violator Unless He First Makes Demand Upon the Violator *After* the Wrong Has Been Committed.

On September 19, 1945, Globe entered into a contract with Maytag whereunder it agreed to sell its entire output of Dutch Ovens to Maytag and Maytag agreed to purchase all of its requirements of gas ranges from Globe (R. 21-26). Letters of cancellation then were mailed by Globe to all of its original distributors and key dealers, including petitioner (R. 27-28, 359-360). Since September 19, 1945 Maytag acted as exclusive distributor for Globe (R. 442).

The Court of Appeals held that petitioner has no cause of action against respondents because of its cancellation as a Globe distributor, because the record is silent that *after* its cancellation it was denied the right to purchase Dutch Oven ranges (R. 495). The Court did not state from whom petitioner was to purchase the Dutch Ovens but presumably it meant from Maytag, because Globe had contracted to sell its entire output to Maytag.

Thus, the Court of Appeals lays down a rule that a condition precedent to the existence of a cause of action by a victim against antitrust violators who have injured him, is that he must make a demand upon the violators *after he has been injured.* This rule flies in the face of long established principles concerning the necessity of demand.

A cause of action for violation of the antitrust laws is one of *tort, Williamson* v. *Columbia Gas & Electric Corporation,* 110 F. 2d 15, 18, (C.A. 3, 1940). The general rule is that no demand is necessary in an action to enforce a liability arising from a tortious act. 1 C.J. 979.

Further, it is universally held that a demand is unnecessary when futile. *Jefferson Tracey* v. *Mary Irwin,* 18 Wall. 549; *Union Naval Stores Company* v. *U. S.,* 240 U. S. 284. In the instant case it is patent that a demand by petitioner upon Maytag to sell it Dutch Ovens at factory prices so that it could compete with Maytag in the distribution of Dutch Ovens would have been a futile gesture, as Maytag's admitted purpose in its dealings with Globe was to obtain the Dutch Ovens for exclusive distribution.

The first case in which the Court of Appeals for the Seventh Circuit has laid down the rule of necessity of demand as a condition precedent to the existence of a cause of action under Section 4 of the Clayton Act is *Milwaukee Towne Corp.* v. *Loew's Inc,.* 190 F. 2d 561. In that case the ruling might be construed as applicable only to the facts of that case. But the instant case in which a distributor's contract was cancelled, makes it evident that the Court of Appeals for the Seventh Circuit makes demand a general condition precedent to the existence of a cause of action for the recovery of damages in any case of wrongful cancellation or refusal to sell or supply a product.

The Court of Appeals for the Seventh Circuit is the only one of which we are aware that has adopted this useless principle. *Cf. Straus* v. *Victor Talking Machine Co.*, 297 F. 791, (C.A. 3, 1924); *American Tobacco Co.* v. *People's Tobacco Co.*, 204 F. 58 (C.A. 5, 1913). Since a wrongful refusal to sell is a continuing wrong, *Connecticut Importing Co.* v. *Frankfort Distilleries*, 101 F. 2d 79, 81 (C.A. 2, 1939), the logical extension of such rule would be that repeated demands are necessary.

The question of necessity of demand is an important one, common to many cases of private actions under the antitrust laws, and should be definitely settled by this court.

V.

The Court of Appeals for the Seventh Circuit Has Revived a Rule of Damages Made Obsolete By Repeated Rulings of This Court, and Its Decision Is In Conflict With a Decision of the Court of Appeals for the Eighth Circuit.

The District Court held the net profits made by Maytag from the sale of Dutch Ovens in petitioner's territory were a proper measure of petitioner's damages (R. 444). With respect to damages, the record shows the following:

(1) The parties stipulated that the period from 1945 to 1948, inclusive, was one of a seller's market in the gas range field (R. 481). During this period approximately 80% of the Dutch Ovens were sold (R. 53).

(2) Defendants stipulated that petitioner was a competent distributor of home appliances (R. 440, 480).

(3) Respondents admitted that Maytag's sales amounted to $500,633.80, and its expenses of making said sales was $59,930.72 (R. 372, 374), or 12% of sales. The unchallenged evidence was that petitioner's expenses in selling home appliances was also 12% of sales (R. 147).

(4) Respondents admitted that Maytag's net profits from said sales was $39,560.36, (R. 372, 374), or 8% of sales. The unchallenged evidence is that petitioner also operated upon the same percentage of net profits (R. 147).*

The Court of Appeals in holding that Maytag's net profits as a measure of petitioner's damages were speculative and uncertain, relied on the old case of *Central Coal & Coke Co.* v. *Hartman,* 111 F. 97 (C.A. 8, 1901). This decision has been largely rendered obsolete by the opinions of this Court in *Eastman Co.* v. *Southern Photo Co.,* 273 U. S. 359 (1927); *Story Parchment Co.* v. *Paterson,* 282 U. S. 555 (1931); and *Bigelow* v. *RKO Radio Pictures,* 327 U. S. 251 (1946). In these cases this Court laid down the rule that when the fact of damages is certain, recovery is not to be denied if the evidence shows the extent of damage as a matter of reasonable inference although the result be approximate. In these cases, this Court approved as measures of damages estimates of profits, history of past profits, and profits made by comparable businesses. On the record in the instant case, Maytag's profits as a measure of petitioner's damages are more direct and certain than the measures of damages approved by this Court in said cases.

In *Bigelow* v. *RKO Radio Pictures,* 327 U. S. 251, this Court reversed the Court of Appeals for the Seventh Circuit which held certain evidence of damages as too speculative and remote to support a judgment. This Court held that such evidence "afforded a sufficient basis for the jury's computation of the damage, *where the respond-*

* In the face of this record, there is no justification for the statement of the Court of Appeals that the record is silent as to the comparative cost of doing business by Maytag and petitioner, and that there is no evidence that from the same amount of sales petitioner would have realized the same profits as Maytag. (R. 496).

ents' wrongful action had prevented petitioners from making any more precise proof of the amount of the damage." (p. 266). (Emphasis supplied)

In the instant case, Maytag's conduct prevented any other proof of damages except its own profits. Since Maytag caused the cancellations of the contracts of all of the original distributors, a comparison with another distributor's profits was not possible. Since the cancellations occurred at the incipiency of business no comparison with past profits is possible, although it is as much a violation of antitrust laws to prevent the birth of competition as to destroy existing competition. *United States* v. *Griffith,* 334 U. S. 100, 107, (1948); *American Federation of Tobacco Growers* v. *Neal,* 183 F. 2d 869, 873 (C.A. 4, 1950). But the Court of Appeals for the Seventh Circuit refused to adhere to the principle of the *Bigelow* case, avoiding it by the simple expedient of calling speculative and remote a measure of damages which in the antitrust field is in fact peculiarly definite and certain. The correcting of this abuse calls for the exercise of this Court's supervisory powers.

Further, the decision of the Court of Appeals for the Seventh Circuit is in conflict with the decision of the Court of Appeals for the Eighth Circuit in the case of *Twentieth Century-Fox Film Corp.* v. *Brookside Theatre Corp.*, 194 F. 2d 846, cert den., 343 U. S. 942. In that case, as here, the violator of the antitrust laws took over the business of the victim and then asserted that its profits were not a proper measure of the victim's damages. The District Court admitted evidence of the violator's profits for a period of 12 years after it took over the victim's business. The Court of Appeals held that the violator's profits were a proper measure of the damages of the victim.

The general question posed is whether, when a violator of the antitrust laws has taken over his victim's business, the violator's profits are a proper measure of the victim's damages. The answer of the Eighth Circuit is "yes", that of the Seventh Circuit is "no". This conflict calls for a determination of the question by this Court.

CONCLUSION.

The decision of the Court of Appeals for the Seventh Circuit

(1) disregards the plain provisions of Section 7 of the Clayton Act;

(2) places such a restricted interpretation upon the words "any part" of trade and commerce appearing in Section 2 of the Sherman Act as to virtually nullify the section;

(3) considers as immaterial the vital fact that Maytag's acquisition of the exclusive distribution of the Dutch Ovens was achieved by means of a combination, conspiracy and contract entered into with certain stockholders of Globe for the purpose of excluding Globe's original 65 distributors;

(4) sets up a novel and harmful requirement in antitrust law of a demand by a cancelled distributor, to be made *after* his cancellation, as a condition precedent to the existence of a cause of action under Section 4 of the Clayton Act; and

(5) fails to adhere to the rule laid down by this Court as to the sufficiency of proof of damages in antitrust actions.

In these respects the Court of Appeals for the Seventh Circuit has acted contrary to the decisions of this Court and is in conflict with decisions of the Courts of Appeals of other circuits.

The questions presented are of general interest and of paramount public importance to the enforcement and administration of the antitrust laws. It is, therefore, respectfully urged that this Court's supervisory powers be exercised and this petition for a writ of certiorari be granted.

Respectfully submitted,

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HAROLD B. WILLEY, C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

No. 659

FARGO GLASS & PAINT CO., A CORPORATION,
Petitioner,

vs.

GLOBE AMERICAN CORPORATION, A CORPORATION, AND THE MAYTAG COMPANY, a CORPORATION,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

I.

STATEMENT OF THE CASE.

Petitioner's statement of the case omits many of the basic facts stated in the opinion of the Court of Appeals (R. 486 to 496, reported 201 F. 2d 534), although with a single exception it does not attempt to question the accuracy of any statement made.* The result is an entirely

* At p. 17, petitioner challenges the statement in the opinion of the Court of Appeals (R. 489) that Globe, except for the first six months of 1949, when there was a general depression in the sale of appliances, has never been able to supply Maytag with the number of ranges ordered. This was the uncontradicted testimony uncallenged even by cross-examination (R. 271). The Plaintiff's present challenge is based solely upon evidence that in planning for post-war production Globe believed its plant would lend itself profitably to setting up facilities to produce 100,000 gas ranges

distorted picture of the transaction which petitioner claims to have violated Sections 1 and 2 of the Sherman Act and Section 7 of the Clayton Act. Petitioner's statement of questions presented and asserted reasons for granting the writ are predicated principally upon such distorted factual picture, together with a further distortion of certain statements in the opinion of the Court of Appeals. The distortions are apparent upon a reading of that opinion. However, a complete restatement of the case will serve to supply the specific record references for the factual statements there made, and in a few instances, a fuller statement may be of assistance to the Court in view of the contentions now made by the petitioner.

PRIOR BUSINESS OF GLOBE AND ARRANGEMENTS WITH TENTATIVE DISTRIBUTORS.

The respondent, Globe, operates a plant at Macomb, Illinois, which has always manufactured agricultural equipment, and a plant at Kokomo, Indiana, where it manufactures gas ranges. In 1938 it commenced the manufacture of a gas range under the trade name "Dutch Oven", but produced only a few hundred a year until 1940, when it made and sold seven or eight thousand (R. 64, 244). From 1942 to 1945 it engaged solely in the manufacture of life boats and other equipment for the Government. In late 1944 and early 1945 it made preparations to reengage in the manufacture of gas ranges and as a part of its program entered into tentative agreements with a number of

a year (R. 270) as a goal to be reached in the second or third post-war production years (R. 395); that it actually manufactured 72,371 ranges in the year ending November 30, 1948 (R. 52); and averaged only 50,000 ranges per year approximately in 1949 and 1950 (Cf. R. 52; F. 47, 48; R. 442). The challenge is utterly unrealistic in view of (a) the undenied depression period in 1949 during which Globe admittedly was able to fill Maytag's orders and (b) the manufacturing curtailments resulting from the Korean crisis in 1950 (R. 271).

wholesalers and large retailers (R. 64-65, 245). Each tentative agreement stated that its object was to define certain territorial limits in which the named distributor or dealer was to sell, and to outline certain working agreements, pending the execution of a formal contract. Each provided specifically for cancellation by either by written notice. One of such agreements was entered into with petitioner, specifying that it was the intention of the Company to grant it a franchise for the State of North Dakota and certain counties of South Dakota and Minnesota (R. 16).

While the tentative agreement did not specifically state that the franchise of each distributor should be exclusive in its territory, it is clear from its provisions (R. 16) that it had that effect (Cf. *Navy Gas & Supply Co.* v. *Schoech*, 105 Colo. 374, 98 P. 2d 860, 862 (Colo., 1940), *White Co.* v. *W. P. Farley & Co.*, 219 Ky. 66, 292 S. W. 472 (Ky., 1927)). Petitioner so construed it prior to the litigation (R. 410, 411, 413) and so claimed and induced the District Court to hold during the trial (R. 218).

IMPASSE BETWEEN STOCKHOLDERS WITH RESPECT TO REENGAGING IN MANUFACTURE OF GAS RANGES.

W. D. Harvey was Chairman of the Board of Directors of Globe, and the largest individual stockholder, owning together with his wife, approximately 30% of the outstanding capital stock. The Macomb Division had formerly been a separate corporation, headed by Harvey, which had merged with the corporation formerly operating the Kokomo plant (R. 267). Harvey had continued to head the group of former Macomb stockholders, which, including Harvey, owned 40% of the Globe stock and in 1945 the majority of the directors were from the Macomb group (R. 79, 268, 348, 349). In June 1945 while Globe was still in

war production only, and more than a year prior to any post-war production of gas ranges, Harvey definitely opposed post-war reconversion of the Kokomo plant and reentry into the gas range business (R. 73, 92, 93, 104, 225, 246, 427, 428). His position was supported by the Macomb group, including the majority of the directors (R. 268).

The principal stockholders of the other group desired to have Globe reengage in the manufacture of gas ranges but considered that it was not practicable to attempt to proceed in the face of the opposition of the Macomb group (R. 290). An initial suggested solution of the dilemma was to split the company, with the Harvey group taking back the Macomb plant, and negotiations were conducted along those lines, but no agreement was ever reached (R. 73-74, 266-267, 282). Efforts were also made by the leaders of the Kokomo group to induce the Harvey group to reconsider (R. 247, 266). Finally, at a directors' meeting in July 1945, a decision was reached to attempt to sell or otherwise liquidate one or both divisions (R. 65, 74, 85-86, 103, 247, 249, 338, 369, 418 to 426). A committee was appointed for this purpose consisting of Harvey, Chester, the president of Globe, and Brown, a large stockholder and former chairman of the Board (R. 277). As a result a broker was employed to attempt to sell the property either as a unit or as two separate plants (R. 65, 73-74, 103, 286-287, 338, 369, 419, 424).

PRIOR SITUATION OF MAYTAG.

The respondent, Maytag, had for years been engaged in the manufacture and sale of washers and ironers. It had a well-established name in that field, an established selling organization, and eight or nine thousand dealers handling its products throughout the country (R. 82, 96). During the war its management concluded that it could economi-

cally and successfully expand the products marketed through its sales and dealer organizations and that such expansion would aid its business as a whole (R. 83, 97-99). One of the principal products which it wanted to add was a gas range (R. 83, 84, 99). It had no desire to engage in manufacturing gas ranges and decided to try to enter into an arrangement with an existing manufacturer to supply it with a distinctive line of ranges which it could market under its own name as its own product (R. 86, 88, 89, 104). Prior to July 1945 it had negotiated at separate times with two other manufacturers of gas ranges to supply it but no arrangement had resulted (R. 84-85, 100-101).

INITIAL CONTACT BETWEEN GLOBE AND MAYTAG AND NEGOTIATIONS.

In the latter part of July 1945, the broker employed by Globe learned of Maytag's interest in gas ranges and contacted it as a possible purchaser of the business (R. 85-86, 101-102, 338). From the beginning of the negotiations Maytag expressed unwillingness to purchase a manufacturing plant and at all times adhered to the position that its only interest lay in an arrangement for a supply of gas ranges which it could market as its own product (R. 90, 91, 104, 105). It liked the Globe range but was doubtful about Globe's capacity, in view of its prewar experience, to produce a volume sufficient for Maytag's needs. Globe originally insisted that it could not consider any arrangement except a sale because of the stockholder impasse (R. 93, 104). In the course of the negotiations the broker suggested the possibility of Maytag buying the stock of the Harvey group as a means of solving the dilemma (R. 70, 104-105). Maytag was reluctant to make any investment in the manufacture of gas ranges but finally agreed to make the purchase if it would result in a satisfactory manufacturing agreement (R. 70, 77-78, 86, 91). It was unwilling

to enter into such an arrangement except upon the basis of buying Globe's entire output. Its reasons were that since the range would be sold as a Maytag product it wanted a distinctive product not identical with a gas range sold by others under some other name, and that it did not believe that Globe had either the capacity or the flexibility to supply Maytag's needs and at the same time produce a different type of range for others (R. 88-89, 270-271).

Globe was willing to enter into such an arrangement, rather than a sale or liquidation, if the objections of the Harvey group could be removed in the manner suggested. In addition to solving the dilemma resulting from its stockholder conflict, the arrangement had obvious economic advantages for Globe as compared with the tentative distributor and key dealer arrangement. Maytag, with its large established dealer organization and its national reputation and good will, which would be expected to attach to a gas range identified as a Maytag product, obviously furnished a more dependable assurance of sales for a virtually new and unknown gas range, which had never been marketed in large quantities. The expense of maintaining a sales department to deal with the separate distributors and key dealers, and problems arising from turnover in distributor personnel was eliminated (R. 343). And the sales to Maytag on a cost-plus basis, as the contract actually negotiated provided (R. 24, 25), assured Globe of greater financial stability. Globe insisted, however, that the contract include an obligation of Maytag to purchase its requirements of gas ranges from Globe for the reason that under the proposed arrangement it would lose its identity as a manufacturer, and be entirely dependent upon Maytag as its market; and its management believed that if Maytag were left free to buy from others, it might not buy enough from Globe to make the arrangement profitable (R. 270, 271).

Maytag was told in the course of the negotiations of the tentative distributor and dealer agreements previously entered into by Globe, but was advised both by Globe and by its own counsel, that since Globe had the unrestricted right to cancel, they would not prevent the proposed arrangement from being entered into and carried out (R. 50-51, 70-71, 90-91, 105-106).

CONSUMMATION OF ARRANGEMENT BETWEEN GLOBE AND MAYTAG.

Early in September 1945 the officers and attorneys of the parties met and drafted the various documents necessary to effectuate the arrangement which had been agreed upon, subject to the approval of their respective boards of directors (R. 105). As a part of the mechanics Brown obtained an option to purchase the Harvey stock at book value and assigned it to Maytag (R. 338-341). The transaction was thereafter consummated on September 19, 1945. On that day, immediately prior to Maytag's purchase of the stock Chester, Brown and Barnes, who had represented Globe in the negotiations and owned approximately 20% of the Globe stock, entered into a contract with Maytag, which included as one of the undertakings of the parties, an agreement to use their best efforts to cause Globe and Maytag to enter into a working agreement to be effective for a reasonable period of time which should assure to Maytag a prior right under certain conditions, to purchase for resale the entire output of gas and electric ranges and related products to be manufactured by Globe (R. 343). Maytag thereupon exercised said option.

At a meeting of the Globe board of directors, which followed immediately, Brown reported in detail the actions of the special committee previously appointed in July to study the various plans proposed for solving the stock-

holder impasse, including the negotiations with Maytag, which had resulted in the purchase of the stock of the Macomb group, and stated that arrangements had been made subject to the approval of the board whereby Maytag would purchase the entire output of Globe. The president of Globe was then ordered to take all necessary steps to cancel the tentative agreements immediately. *Thereafter* Harvey and the other four directors from the Macomb group resigned and their successors were elected (R. 348, 349, 350). The new board thereafter met and approved the arrangement with Maytag (R. 353).

The agreement entered into (R. 21-26) provided for the sale of Globe's output of gas and electric ranges, and repair parts therefor, to Maytag, and the purchase by Maytag from Globe of its requirements of such products for distribution and sale. By its terms it was to extend to November 30, 1948, subject to the satisfactory performance of certain terms and conditions by each party, and to continue thereafter until terminated by either party by twelve months' written notice.

Globe thereupon cancelled its tentative arrangements with distributors and dealers, including petitioner, by written notice as therein provided (R. 51).

PETITIONER'S AGREEMENT FOR DISTRIBUTION OF GRAND RANGE.

Approximately two weeks after Globe cancelled its tentative agreement with petitioner, and long before any gas ranges were available on the post-war market, petitioner entered into a distributor agreement with Grand Home Appliance Company for the distribution of the latter's line of "Grand" gas ranges in substantially the same territory (R. 408). The Grand range is a competitor of the range manufactured by Globe (R. 174, 187-188). Grand

gas ranges had been sold generally in the petitioner's territory before the war and enjoyed a good name and reputation there, whereas there had been no prewar distribution of Globe gas ranges in the territory and few, if any, such ranges had been sold there (R. 137, 145, 160, 166, 244, 299). At all times during and after 1946, and up to and including the trial of this case, petitioner acted as distributor for the Grand range.

THE RANGE MANUFACTURED BY GLOBE IS A STANDARD GAS RANGE IN COMPETITION WITH ALL OTHER STANDARD GAS RANGES.

Petitioner has contended throughout the litigation that the range manufactured by Globe should be regarded as a unique product because it is the only gas range that combines an automatic shut-off device with heat-retention. The claim is wholly artificial. Practically all manufacturers of standard gas ranges equip their product with an automatic shut-off device and there is nothing in the record tending to show that the Globe means are superior to others in any respect, or from any standpoint (R. 193, 194). All ovens also retain heat to some degree. Longer heat retention is merely a matter of additional insulation and closing the oven vent when gas is shut off. But many manufacturers are not impressed with the merits of heat-retention or use of the oven for fireless cooking (R. 174-175). The reason is that 65% to 70% of all cooking is done on the top burners and does not involve use of the oven, and that even when the oven is used, fireless cooking is effective only with certain types of food (R. 174-175, 187, 194, 243), and its use actually wastes gas where only a short period of cooking is required (R. 243). Any manufacturer, of course, can feature heat-retention and combine it with an automatic shut-off device if he so desires. At present, Chambers is the only other manufacturer featuring heat-

retention (R. 199, 253). Chambers at the time of the trial of this cause had never made use of automatic shut-off. By petitioner's process of reasoning, Chambers also manufactured a unique product because it alone had heat-retention without automatic shut-off.

Globe is one of approximately seventy manufacturers of standard gas ranges in the United States (R. 151, 153), practically all of which advertise features of some type as exclusive (R. 170-171, 186, 198-199, 201). The Grand range for example advertises and stresses as exclusive features a broiler utilizing ceramics for developing intense broiling temperatures, and a safety device for shutting off the gas to the top burners (R. 170-171, 173, 182-183, 195-198). But both Globe and Grand are nevertheless classified as standard ranges, competitive with all other standard ranges (R. 124, 153, 174, 187-188, 199, 205-206, 317, 323.) Globe's product is one of many makes of competitive gas ranges, just as Ipana is one of many brands of toothpaste, Sparton is one of many makes of radios and televisions, and Philip Morris is one of many brands of cigarettes.

Under the Maytag arrangement, Globe, which had been a negligible factor in the industry before the war, ranked 18th among the various gas range manufacturers in 1949, with shipments constituting 1.97% of the national total, and 20th in 1950 with shipments constituting 1.82% of such total. By comparison, however, the leading ten manufacturers shipped approximately 52% of such total (R. 156).

When the foregoing uncontroverted facts, substantially all of which appear in the opinion of the Court of Appeals, are compared with petitioner's statement of the case the omissions and distortions of the latter are too obvious to require further comment. As will appear in detail from the discussion which follows, substantially none of the questions claimed by petitioner to be presented, are actually

presented in anything resembling the form in which petitioner has stated them. In each instance this is because of either wide differences between petitioner's assumed facts and the record, or obvious misconstruction of what the Court of Appeals has actually said in its opinion, or both.

II.

ARGUMENT.

A. THE CONTENTION THAT THE ARRANGEMENT BETWEEN THE RESPONDENTS VIOLATES SECTION 7 OF THE CLAYTON ACT.

Petitioner contends that Maytag's purchase of Globe stock was in violation of Section 7 of the Clayton Act because it resulted in an agreement to sell Globe's entire output to Maytag instead of selling to the sixty-five exclusive distributors and key dealers in their respective territories. Maytag would clearly not have purchased the stock except for the purpose of removing the objections of the Macomb stockholders to Globe reengaging in the manufacture of gas ranges, and unless assured that an agreement under which it had the right to buy Globe's entire output would be entered into. But no illegal restraint or wrongful monopoly of a line of commerce, within the meaning of either the Sherman or Clayton Acts, resulted from such purchase.

Even where some degree of competition has previously existed between a corporation acquiring the stock of another and the latter, it has always been held that whether such acquisition constitutes a violation of Section 7 of the Clayton Act must be measured by the rule of reason, that

is whether the resulting restraint or tendency toward monopoly is undue and unreasonable. *United States* v. *Columbia Steel Co.*, 334 U. S. 495 (1948); *International Shoe Co.* v. *Federal Trade Commission*, 280 U. S. 291, 298 (1930); *United States* v. *Republic Steel Corp.*, 11 F. Supp. 117, 123 (N. D., Ohio, 1935); see Handler, *Industrial Mergers and the Antitrust Laws*, 32 Col. L. R. 179, 264 to 265 (1932), and *Section 7* of the *Clayton Act; A Legislative History*, 52 Col. L. R. 766, 770, 777 (1952). In this case there was, of course, no prior competition of any character between Globe and Maytag.

Petitioner urges the applicability of *International Salt Co.* v. *United States*, 332 U. S. 392 (1947), merely because the total amount of commerce affected by the Globe Maytag agreement (which was non-existent at the time the agreement was made) has amounted to as much as $5,000,000 per year since. But that case has no application here. Even where the issue was a violation of Section 3 by a system of exclusive dealing contracts this Court said in *Standard Oil Co.* v. *United States*, 337 U. S. 293, 307 (1949):

> "And so we could not dispose of this case merely by citing *International Salt Co.* v. *United States*, 332 U. S. 392." *

This Court has stated with respect to Section 3 that the purpose of the Clayton Act was to supplement the Sherman Act as a preventive measure which would restrain in their incipiency acts and transactions which when full-blown would violate the latter act, *Standard Fashion Co.* v. *Magrane-Houston Co.*, 258 U. S. 346, 357 (1922); cf. as to

* The *International Salt* case has been the subject of much "uncritical citation," one instance of which is made mention of by Mr. Justice Frankfurter in his dissenting opinion in *Federal Trade Commission* v. *Motion Picture Advertising Service Company, Inc.*, 344 U. S. 392.

Federal Trade Commission Act, *Federal Trade Commission* v. *Motion Picture Advertising Service Co., Inc.*, 344 U. S. 392 (1953). Certainly there could be no reason for imputing a more drastic effect to Section 7. It follows as a necessary corollary that an effect which when full-blown would not fall within Sections 1 or 2 of the Sherman Act could not in its incipiency violate any section of the Clayton Act. Cf. opinion of Mr. Justice Frankfurter in *Federal Trade Commission* v. *Motion Picture Advertising Service Co., Inc.*, 344 U. S. 392, 401 (1953).

The effect complained of here is simply that Globe and Maytag have entered into a contract under which the entire output of Globe is sold to Maytag and to no one else. Every exclusive dealing contract restrains the parties thereto from dealing with others, and results in a monopoly of each of the parties with respect to the business of the other in the subject-matter of the contract. But as this Court has frequently declared, it has never been a policy of the antitrust laws to outlaw normal and usual contracts incidental to lawful purposes and intended to further legitimate trade, even though incidental restraints result. *Standard Oil Co.* v. *United States*, 221 U. S. 1, 58, 62 (1911); *Eastern States Retail Lumber Dealers' Assoc.* v. *United States*, 234 U. S. 600, 610 (1914); *Nash* v. *United States*, 229 U. S. 373, 376 (1913). And an exclusive dealing contract is not unlawful *per se*. *Federal Trade Commission* v. *Motion Picture Advertising Service Co., Inc.*, 344 U. S. 392 (1953); *United States* v. *Columbia Steel Co.*, 334 U. S. 495, 523 (1948). Such an agreement violates the antitrust laws only when an actual wrongful purpose or intent to effect an illegal restraint or wrongful monopoly, or an actual unreasonably restrictive effect on competition is established.

No Wrongful Purpose or Intent Is Involved.

There are no facts in the record in this case from which such an intent can be inferred. Maytag's reasons for insisting on an exclusive arrangement were, under the undisputed evidence, based upon its bona fide and normal business needs. In order to engage in the successful marketing of gas ranges as its own product it had to have an adequate and assured supply of ranges. The undisputed evidence was that it did not believe that this could be obtained from Globe unless it bought Globe's entire output and its belief was well-founded (R. 271). Moreover, Maytag did not want to expend its efforts and money in advertising and building up from scratch a range marketed as its product, if an identical range made by the same manufacturer for distribution through others under some other name, could benefit from Maytag's good will and efforts and expenditures to promote the sale of the range bearing its name. Reasons of the same character were held to justify an exclusive manufacturing and distributing arrangement in *United States* v. *Bausch & Lomb Optical Co.*, 45 F. Supp. 387, 398 (S. D. N. Y., 1942), aff'd. 321 U. S. 707 (1944).

Petitioner's argument (p. 15) refers to Finding No. 36 of the District Court (R. 441) which states that the agreement of Maytag to purchase the Globe stock was not made for the purpose of acquiring an investment but was made for the sole object of acquiring for Maytag the exclusive distribution of Dutch Ovens and of eliminating the competition of the tentative distributors and key dealers in the distribution of such ranges. While the agreement with Maytag could not be carried out without terminating the tentative agreements, there is no justification in the record for characterizing such termination as the object of the stock purchase.

The record establishes without controversy that the object of the respondents was to enter into an agreement in furtherance of their own legitimate business interests which violated no legal right of petitioner. The negotiations were begun at the instance of Globe, and continued throughout solely on the basis that Globe could not manufacture gas ranges for anyone unless the objections of the Harvey group could be removed. No feasible method of accomplishing that result had been suggested except the purchase of their stock. Globe was not required by any principle of antitrust or general law to refuse to enter into an otherwise lawful arrangement with Maytag, because of the remote possibility of finding some other solution which would not only have permitted it to continue in business, but would also have permitted it to go forward with the tentative distributors. Cf. *International Shoe Co.* v. *F. T. C.*, 280 U. S. 290, 302 (1930).

Every exclusive agreement, however lawful, eliminates actual or potential competition for the product of the parties but such elimination is only an incidental result of the exercise of a legal right. As construed by the District Court, petitioner's own agreement gave it an exclusive right to distribute Globe ranges in its specified territory (R. 218). That agreement likewise, while in effect, eliminated all competition of others in the distribution of Globe ranges in that territory. No exclusive agreement could be lawful if the mere elimination of dealing with others which necessarily results from such an agreement, evidences a purpose or intent violative of the antitrust laws.

No Restrictive Effect On Commerce Is Involved.

Nor did the arrangement under the facts of this case have any restrictive effect upon commerce which could make it either an actual or potential unreasonable restraint or wrongful monopoly. Its sole effect was that Maytag

became the only wholesale buyer and seller of ranges manufactured by Globe, instead of the sixty-five exclusive tentative distributors and key dealers in their respective territories as originally contemplated. There is no claim that the supply of Globe ranges, their movement in interstate commerce, their quality, or their availability at retail outlets throughout the United States was impaired, or that their price was increased, or that the public was otherwise affected by the substitution. Cf. *Feddersen Motors Inc.* v. *Ward*, 180 F. 2d 519, 522 (10th Cir., 1950); *Shotkin* v. *General Electric Co.*, 171 F. 2d 236, 238, 239 (10th Cir., 1948); *Riedley* v. *Hudson Motor Car Co.*, 82 F. Supp. 8, 10 (W. D. Ky., 1949). The arrangement made assured the resumption of the manufacture of gas ranges by Globe and the entry of Maytag into a field where it had never previously competed, and thereby increased competition in the manufacture and sale of gas ranges.

There were at least seventy manufacturers of competitive gas ranges in the United States, many of which had larger sales than the respondents have ever been able to achieve. As previously pointed out (*ante*, p. 10) the range manufactured by Globe which had been a negligible factor in the industry, became a substantial competitor, as a result of the Maytag agreement, although it remains one of the smaller manufacturers, ranking 18th in 1949 and 20th in 1950 with less than 2% of the total national shipments each year, while by comparison the ten largest manufacturers shipped 52% of the total.

There is no evidence in the record that any tentative distributor was unable to make a satisfactory arrangement with another competing range manufacturer. Petitioner, as previously stated, promptly made such an arrangement with a competing manufacturer, Grand, and has distributed that range ever since.

Exclusive Distribution Is Not Wrongful Monopoly.

Every manufacturer has a natural monopoly of the products of its own manufacture, and may distribute its product directly to retailers or even to the public. It may market it through an exclusive agent or agents, or sell it to a single distributor or as many distributors as it desires. Section 2 of the Sherman Act has never been held to require all manufacturers to establish competitive distribution, and is not violated merely because the method of distribution selected is exclusive. *Virtue* v. *Creamery Package Mfg. Co.*, 227 U. S. 8 (1913); *Locker* v. *American Tobacco Co.*, 218 Fed. 447, 449 (2d Cir., 1914); *United States* v. *Imperial Chemical Industries, Ltd.*, 105 F. Supp. 215 (S. D. N. Y., 1952); *United States* v. *Bausch & Lomb Optical Co.*, 45 F. Supp. 387, 399 (S. D. N. Y., 1942), aff'd. 321 U. S. 707 (1944). Cf. *Federal Trade Commission* v. *Motion Picture Advertising Service Co., Inc.*, 344 U. S. 392 (1953).

Under the foregoing principles the agreement between Globe and Maytag has not created any illegal restraint or unlawful monopoly within the meaning of the Sherman Act and no reasonable future possibility of any such result is indicated. Section 7 of the Clayton Act was obviously not intended to make the purchase of corporate stock unlawful *per se*, merely because the purpose of the purchase is to make it possible for the corporation whose stock is acquired, to enter into an otherwise lawful exclusive agreement with the purchaser which involves a dollar amount of commerce that could be regarded as substantial. The Court of Appeals properly held that no violation of that statute or of the Sherman Act has occurred in this case.

Petitioner Distorts Holding of Court of Appeals.

Petitioner's statement (p. 17) that the Court of Appeals held that Maytag was justified in purchasing the Globe stock and excluding the 65 distributors because it did not believe that Globe had the capacity to supply its requirements and at the same time manufacture a gas range of a different type for the other distributors is an obvious distortion of the language of the opinion. The Court of Appeals found that the transaction between Globe and Maytag was a perfectly normal and legitimate transaction entered into in furtherance of the legitimate business requirements of the parties for proper business reasons. That Maytag required Globe's output for its own business necessities was a normal business reason for the agreement entered into. Similarly, this Court said in *United States* v. *Columbia Steel Co.*, 334 U. S. 495, 506-507, 532-533 (1948), that the testimony of Fairless that United States Steel's purpose in purchasing Consolidated was to assure a market for plates and shapes produced at Geneva, reflected a normal business purpose rather than a scheme to circumvent the law. And in *United States* v. *Bausch & Lomb Optical Co.*, 45 F. Supp. 387, 398 (S. D. N. Y., 1942), it was said with respect to an exclusive agreement under which Bausch & Lomb Optical Company manufactured solely for Soft-Lite, that the main purpose of the contract was to provide a source of supply for Soft-Lite and that the restraining covenant was for the protection of the purchaser who was spending large sums to develop good will and enlarge the public patronage of a relatively new article of commerce.

If the negotiations between Globe and Maytag had resulted in a sale of the business as Globe originally contemplated, instead of a sale of the output, the result so far as petitioner was concerned would have been the same.

Maytag was unquestionably free to buy or lease the Globe plant and devote the entire output to supplying its own requirements. The agreement to buy the entire output and the purchase of the stock to enable Globe to reengage in the manufacture of gas ranges and to enter into such an agreement, involves no different principle or result, as far as the antitrust laws are concerned.

Petitioner's assertion that the Court of Appeals announced a principle that an otherwise wrongful monopolization is justified if a commodity is in short supply is, as shown by the foregoing discussion, an obvious distortion of the opinion. No such question was involved or discussed.

There Is No Conflict With Decision of Court of Appeals for the Third Circuit.

Petitioner also asserts a conflict between the interpretation of Section 7 of the Clayton Act in this case and that of the Court of Appeals for the Third Circuit in *Pennsylvania R. Co.* v. *Interstate Commerce Commission*, 66 F. 2d 37, 40 (3rd Cir., 1933). No attempt is made to demonstrate that any such conflict exists and it is obvious that no similar problem was either involved or decided in that case.

B. THE CONTENTION THAT THE COURT OF APPEALS DECIDED THAT SECTION 2 OF THE SHERMAN ACT IS NOT VIOLATED UNLESS ALL OF A CERTAIN CLASS OF PRODUCTS ARE MONOPOLIZED.

The Court of Appeals announced no principle of law that Section 2 of the Sherman Act is only violated by a monopoly which includes all makes of commodities falling within a particular class. It held merely that an agreement to buy the output of a single manufacturer of a commodity in com-

petition with many manufacturers of other brands of the same commodity, did not result, under the facts and circumstances shown by this record, in an unlawful monopoly violative of Section 2 of the Sherman Act. Under the principles heretofore announced by this Court, an agreement for the purchase of the entire output of a single manufacturer creates no unlawful monopoly *per se*, and the Court of Appeals found no facts or circumstances which could render the arrangement made in this case unlawful either because of its intent and purpose or because of its actual impact on competition. In determining the reasonableness or unreasonableness of the impact of such an agreement on competition, the competition to be considered must of necessity be that of the similar products manufactured by others. *United States* v. *Columbia Steel Co., et al.*, 334 U. S. 495, 510-511 (1948); *United States* v. *Aluminum Company of America*, 91 F. Supp. 333, 345 (S. D. N. Y., 1950). Substantially every exclusive agreement of purchase and sale could be claimed to create unlawful monopoly if nothing is to be considered except the product of the parties to the agreement.

The Court of Appeals cites *Carter-Crume Co.* v. *Peurrung*, 86 Fed. 439 (6th Cir., 1898), in which it was held that a contract with an independent manufacturer for the entire product of his plant is not in itself an illegal restraint of trade. It was said that another question might arise if all or a large proportion of all the producers of a particular article should agree to sell their product to a single buyer. This is in accord with the principle stated in Restatement of the Law, Contracts, Sec. 516(e). The opinion of the Court of Appeals merely points out that the claim of monopoly made here is limited to the distribution of the gas ranges produced by a single manufacturer, Globe, and that under the facts and circumstances disclosed by this record, such a monopoly does not violate the Sherman Act.

That Court did not purport to, and did not construe the words "any part of the trade or commerce among the several states" in a manner inconsistent with *Indiana Farmers' Guide Pub. Co.* v. *Prairie Farmer Pub. Co.*, 293 U. S. 268, 279 (1934); *Lorain Journal* v. *United States*, 342 U. S. 143, 151 (1951); *United States* v. *Yellow Cab Co.*, 332 U. S. 218, 226 (1947); *Goldman Theatres* v. *Loew's, Inc., et al.*, 150 F. 2d 738, 744 (3rd Cir., 1945); or any other decision of this Court or of any Court of Appeals.

C. THE CONTENTION THAT THE COURT OF APPEALS DISREGARDED THE BASIC PRINCIPLE THAT AN ACT LAWFUL WHEN DONE BY ONE MAY BECOME WRONGFUL WHEN ACHIEVED THROUGH CONCERT OF ACTION.

Petitioner also contends that conceding the legality of an arrangement to buy the entire output of a manufacturer, the respondents nevertheless violated the antitrust laws because (it is asserted) the selection of Maytag as a customer was not the free and independent act of Globe, but resulted from a combination or conspiracy engaged in by Maytag to exclude competitors from commerce. Petitioner claims in effect that while Globe was proceeding toward its goal of post-war reconversion of its plant for the manufacture of gas ranges and distribution of such ranges through a distributor organization with which it was perfectly satisfied, Maytag entered into a conspiracy with certain stockholders of Globe, to acquire by purchase, an amount of stock which, together with the holdings of such stockholder conspirators, would result in control of Globe, and to use that control to compel Globe to cancel the tentative agreements and enter into the Maytag agreement. Whatever the legal principles applicable to such a state of facts, the claim is unsupported by anything in the record. Since the Court of Appeals was unable to discern any such unlawful combination or conspiracy, petitioner asserts that it disregarded

the principle that an act lawful when done by one may become wrongful when achieved through a concert of action.

The evidence establishes without contradiction that regardless of Globe's satisfaction or dissatisfaction with its dealer organization, a 40% group of its stockholders which included a majority of the board of directors, took the firm position in June 1945, that Globe should not go back into the manufacturing business at all; that all efforts to settle the divergent views within the group failed; and that it was decided that a sale or liquidation was necessary. Globe, through a broker employed by a special committee of the directors authorized to seek a solution of the problem, contacted Maytag (previously a complete stranger) as a purchaser of the business. Negotiations which followed resulted in an agreement between the representatives of Globe, acting as such, and the representatives of Maytag, that Maytag would remove the objections of the Harvey group by buying their stock at book value, and that Globe would then enter into an agreement to manufacture only for Maytag. The stock purchase was proposed, not by Maytag, but by Globe's broker. The contract between Chester, president and a director of Globe and a member of the special committee, Brown, director and former chairman of the board of Globe and a member of the special committee, Barnes, a director and general counsel for Globe, and Maytag (R. 343) whereby Maytag agreed to purchase not less than 40% of the Globe stock and the parties agreed among other things, to use their best efforts to cause Globe to enter into an agreement with Maytag for the purchase of Globe's entire output, was not entered into until after the entire agreement had been fully negotiated, and required only approval of the board of directors (R. 105). The entire negotiation was reported to the same board of directors which had appointed the special committee (R. 348, 398, 399) and that board, the majority of

the directors being from the Harvey group, ordered the immediate cancellation of the agreements with the tentative distributors (R. 349).

The basis of the decision of the District Court that respondents violated the antitrust laws, as clearly appears from the record (R. 295, 296), was not that Globe had been coerced into entering into the Maytag arrangement and cancelling the tentative distributors, by a conspiracy between certain of its stockholders and Maytag, but that while Globe could otherwise have entered lawfully into an agreement to sell its entire output to Maytag, it was precluded from doing so under the facts of this case, because it had previously entered into agreements with the tentative distributors, even though it had the admitted right to terminate such agreements at will. This view would, in effect, restrict the right to enter into a lawful agreement for exclusive distribution to manufacturers having no business relations with others at the time. No decision of this Court recognizes such a limitation upon the right to enter into such an agreement and no principle of antitrust or general law sanctions it.

A manufacturer has the right to select his own customers for any reason satisfactory to himself provided that such selection is not used as a means of creating or attempting to create an illegal restraint or monopoly. Cf. *Lorain Journal* v. *United States*, 342 U. S. 143, 155 (1951). Subject to the same limitation the right of selection necessarily includes the right to change customers, to enter into lawful arrangements with new customers, and to terminate terminable relations with existing customers in order to do so. The right of a manufacturer to enter into an exclusive arrangement for the disposition of its product is subject to the same limitation as to purpose or intent or restrictive effect. Since unlawful purpose or restrictive effect cannot be predicated solely upon the fact that an exclusive arrange-

ment excludes those not parties, it necessarily follows that a manufacturer's right to terminate existing terminable relations in order to enter into an arrangement with another includes the right to terminate in order to enter into an otherwise lawful exclusive arrangement. There is no legal or logical reason why such an agreement should create an unreasonable restraint or unlawful monopoly, solely because an otherwise lawful contractual right to cancel a prior agreement with another has been exercised. The mere exercise in combination of two legal rights cannot by any logical process produce a wrong.

Certainly an arrangement by which the entire output of a manufacturer is sold to a single customer cannot itself constitute an unlawful combination or conspiracy between the buyer and the seller, merely because both are aware that its performance will necessarily require the exercise by the seller of a right to terminate prior relations with others. Petitioner cannot distort a lawful transaction into a violation of the antitrust laws merely by characterizing it as an unlawful combination and calling the parties thereto conspirators.

A wrongful combination or conspiracy requires either an unlawful object or the use of unlawful means. *Duplex Printing Press Co.* v. *Dearing*, 254 U. S. 443, 465 (1921); *National Fireproofing Co.* v. *Mason Builders' Assn.*, 169 Fed. 259, 264 (2d Cir., 1909). Acts lawful if done by parties acting individually, can be unlawful if done in concert only if the object to be achieved is unlawful. A lawful object accomplished by lawful means, however concerted, can never add up to unlawfulness.

There is nothing in the opinion of the Court of Appeals which disregards the principle that acts lawful if done by one may become wrongful when achieved through concert of action. That principle simply has no application to this case.

D. THE CONTENTION THAT THE COURT OF APPEALS ANNOUNCED A PRINCIPLE THAT A VICTIM OF ANTITRUST LAW VIOLATIONS HAS NO CAUSE OF ACTION AGAINST THE VIOLATOR UNLESS HE MAKES A DEMAND AFTER THE WRONG HAS BEEN COMMITTED.

Petitioner also asserts that the Court of Appeals has announced in this case a rule that a victim of antitrust law violations has no cause of action against the violator unless he has made a demand upon such violator after the wrong has been committed. No such principle has been announced. The Court of Appeals held specifically that the contract and arrangements between the respondents did not violate Sections 1 or 2 of the Sherman Act or Section 7 of the Clayton Act. Petitioner consequently was not a victim of antitrust law violation, and respondents were not violators of the antitrust laws. Nothing in the opinion can be construed as holding or even implying that one whose contract for the sale of a commodity has been cancelled pursuant to a violation of the antitrust laws, must as a condition precedent to the recovery of damages make a subsequent demand that he be supplied with the commodity. The opinion of the Court of Appeals does state correctly that there is no evidence that since the Globe-Maytag agreement, petitioner has attempted to procure or been denied the right to procure Dutch Oven gas ranges required for bona fide needs of its trade in the distribution of appliances, and that as shown by the evidence at least two of petitioner's original dealers are selling Maytag ranges in the territory. There is nothing in the opinion indicating that that fact entered in any manner into its decision that no antitrust law violation was shown, or that petitioner was denied for that reason a recovery to which it would otherwise have been entitled.

In *Milwaukee Towne Corp.* v. *Loew's Inc.*, 190 F. 2d 561 (7th Cir., 1951), where certiorari was denied by this Court

(342 U. S. 909), a determination of antitrust law violation was sustained, but it was held that the plaintiff could not claim to have suffered damage on account of a failure to receive first-run pictures until it had actually requested and been refused first-run pictures. No such situation is involved here.

E. THE CONTENTION THAT THE COURT OF APPEALS ANNOUNCED AN ERRONEOUS RULE OF DAMAGES.

The Court of Appeals held that since no violation of the antitrust laws was shown, it was unnecessary to decide respondents' contention that the damages awarded were improperly measured, but nevertheless stated that the profits made by Maytag from sales in the territory would not have been the proper measure of petitioner's damages in any event. Respondents contended that under the facts of this case not only were the Maytag profits not a proper measure of damage but that it could not be inferred therefrom that petitioner was damaged at all. The District Court's conclusion that Maytag's profits from the sale of gas ranges prior to the trial of this cause in the territory assigned to petitioner were the proper measure of its damages (R. 444) completely ignored petitioner's distribution of Grand ranges in the same territory during the same period. The Globe range was substantially unknown in petitioner's territory prior to the time it was sold as a Maytag range (R. 137, 145, 160, 166-167). On the other hand the Grand range was well and favorably known there (R. 137, 166). Both the Globe and Grand agreements contained provisions restricting petitioner from handling simultaneously another competitive range (R. 16, 18, 408). The finding of the District Court that the provision in the Globe agreement (but not the Grand) was invalid because it had the effect of substantially lessening competition in gas ranges (F. 50, R. 443) and that consequently petitioner

was free to repudiate it and handle a competing line simultaneously has no support in the record. Cf. *Federal Trade Commission* v. *Motion Picture Advertising Service Co., Inc.*, 344 U. S. 392 (1953). Nor was there any evidence that petitioner ever contemplated handling a competing range simultaneously with the Globe range, and it is clear that the Grand line was taken on only because of the Globe cancellation and as a substitute therefor (R. 122, 149, 407, 413). Under such circumstances petitioner could suffer no actual loss because of the cancellation unless it sold fewer Grand ranges or realized lower profits therefrom than if it had sold Globe ranges. To permit it to recover the amount of the Maytag profits without taking into account in any manner the profits from handling the Grand line would have given petitioner not merely compensation for loss sustained because of the cancellation of its agreement, but profits because of such cancellation. No such result is contemplated by Section 4. *Clark Oil Co.* v. *Philips Petroleum Co.*, 148 F. 2d 580, 582 (8th Cir., 1945), cert. den. 326 U. S. 734 (1945).

There was no finding that petitioner would have sold more Globe ranges than Grand ranges, or realized any greater profits therefrom and there is no factual basis for an assumption that the number of ranges sold by Maytag under its own name, and through its own dealer organization coincided with the number of Globe ranges that petitioner would have sold during the same period of time. There was undisputed evidence that Maytag's established reputation for product, quality and service was the biggest selling feature of the Maytag range (R. 160-161, 167-168). Under these facts the situations of petitioner in handling Globe ranges and Maytag in selling a product bearing its name were not comparable within the principles under which the fact of damage was held properly inferred from a comparison with other theatres in *Bigelow* v. *RKO Radio Pictures*, 327 U. S. 251 (1946).

Nor is there any basis for petitioner's assumption that during the seller's market in 1945 to 1948 it would have obtained from Globe and sold, the same number of gas ranges that Maytag sold in the territory. Under the provisions of the several tentative agreements Globe had initial orders for an aggregate of 35,000 gas ranges for the first six months of production, representing half of the total annual quotas assigned to the tentative distributors and key dealers, including petitioner (R. 369). Its annual production of gas ranges for the full fiscal year ending November 30, 1947, was 39,117 units and for the year ending November 30, 1948, 72,371 units (R. 52). Petitioner's annual quota was fixed in the tentative agreement as 400 units, or 200 units for the first six months (R. 16, 17). Its pro rata share would therefore have been in the proportion of 200 to 35,000. Assuming fair proration of Globe's actual production among all the tentative distributors (and there is no basis for an assumption that petitioner would have been favored as against other distributors) petitioner would have received only 230 units for the fiscal year 1947, and 413 units for 1948. As stated in the opinion of the Court of Appeals (R. 491, 492) it actually sold 67 Grand ranges in 1946, 393 Grand ranges in 1947, and 633 Grand ranges in 1948) or 383 more ranges than it could have received from Globe on a pro rata basis). Maytag was bound by no quota obligation and was free to distribute the ranges it purchased from Globe as it pleased.

When the fact of loss is established by evidence from which such an inference can reasonably be drawn, this Court has held that the amount of loss need not be shown with mathematical accuracy, but may be approximated from any evidence from which such approximation can reasonably be made. It has never held, however, that either the fact or the amount of loss can rest entirely upon mere conjecture and speculation. There is nothing in any of the

cases cited by petitioner which would justify, under the facts of this case, the District Court's conclusion that loss was not only established by mere proof of the amount of Maytag's profits, but was properly measured thereby. As applied to these facts, the statement of the Court of Appeals that the profits made by Maytag would not have been the proper measure of petitioner's damage even if violation of the antitrust laws had been established, and that damages which are purely speculative cannot be recovered, was clearly right.

The petition is without merit and should be denied.

Respectfully submitted,

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